

July 14, 1953

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Mrs. Georgia E. Smith

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CONCORD, N.H.

The provisions of Revised Laws, chapter 27-A as inserted by chapter 133, section 5, laws of 1945, provided that "on or after July 1, 1950, any member in service who attains or has attained age seventy, shall be retired forthwith or on the first day of the next calendar month, unless an extension of service is granted by the governor and council."

By resolution of the Governor and Council May 25, 1950, it was provided that all state employees shall make written application for continuation of employment to the Governor and Council not less than 15 days prior to the date when the said employee would be eligible for retirement and on June 22, 1951 the Governor and Council, by resolution, provided that:

"(1) All employees upon reaching the age of seventy years shall retire except for good and sufficient cause;

"(2) Consideration for extension of service shall be granted to an employee's application only when (a) the applicant's extension of service shall be recommended by the official who is responsible for the policy of the department or institution in which the employee works, (b) a physician's certificate is filed indicating that said applicant is both mentally and physically fit to perform the duties of such employment, (c) the continuation of the position is necessary for the efficient functioning of the department, and (d) considering all of the income of said employee, both from the Employees' Retirement System and all other sources, the sum total of said income is, in the opinion of the Governor and Council, insufficient to maintain a decent standard of living for said applicant."

Public statements at the time of passing of that resolution indicated that the then Governor and Council, after conference with representatives of state employees, intended the foregoing as temporary relief of certain persons who were not in a position immediately to assume self support at that time. In approving said policy it was stated as their belief that all those in state service, subject to the provisions of the Retirement Act, "can now look ahead to placing themselves in a position to retire at age seventy, and will recognize that future extensions will be minimized and eventually abolished."

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I am informed that on June 24, 1952, Superintendent Swallen of the New Hampshire State Hospital notified Mrs. Smith by letter that her retirement was mandatory upon her attaining age seventy without making reference to the extension of service provision of the Act. On May 21, 1953 Mrs. Smith became seventy years of age, was retired and terminated her services on that date although I further understand that it was the intention and verbal arrangement of the hospital authorities to request the temporary continuation of Mrs. Smith as an Attendant III for 44 days after May 21, possibly in anticipation of the legislation, which is now chapter 183, Laws of 1953. Had such extension been requested and granted by the Governor and Council, presumably the Personnel Committee would have considered her request for a year's extension as has been, I understand, done in the case of others who were on granted temporary extensions after age seventy at the time chapter 183, Laws of 1953 became effective.

I further understand that Mrs. Smith's request for a year's extension was filed on June 4, 1953, within a week after enactment of the 1953 amendment and that her request was received five days before the Personnel Committee to which she was required to apply by the terms of the new statute was established. It is my opinion that this constitutes a unique situation not likely to be encountered again in the Committee's work. I believe the Committee has now been constituted long enough so that any applications not heretofore filed by other persons who attained age seventy in May or June 1953 may be considered waived and that strict adherence to the procedures now established should be hereafter required.

It is not intended hereby to establish any precedent for the retention in service of persons who have not complied with the letter and spirit of the provisions of paragraph 1 of section 5 of chapter 27-A of the Revised Laws as inserted by chapter 183, Laws of 1945 and amended by chapter 183, Laws of 1953. However, it is my opinion that in this special unique, one-of-a-kind situation, namely: the anticipated 44 day temporary extension having been lost through the oversight of someone in the hospital, the employee having acted within a week from the time of the enactment of the 1953 Law to attempt to bring herself within its provisions, and her petition for extension having been filed before the Personnel Committee was completely established, that Personnel Committee has the right, if it so desires, to consider her petition upon its merits apart from the technicalities of filing, provided such consideration is given in the light of the statement of policy and resolution of June 22, 1951 above referred to.

I arrive at this decision not without some misgivings. Where rules and policies are attempted to be laid out with preciseness, strict reasoning would appear to dictate the conclusion that Mrs. Smith foreclosed her rights by not checking to see what had been done with her request for 44 days extension before accepting retirement on May 21. If extensions under the 1953 Act had not been granted to others who had temporary extensions after

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age seventy, I would so rule. No occasion for such temporary extensions should arise in the future, however. Notwithstanding the provisions of the law, it is still true that those in state service subject to the provisions of the law should look ahead to place themselves in a position to retire from service at age seventy and should recognize that future extensions will be minimized and eventually abolished. It is my further opinion that, in the case of employees who are granted extensions of one year by the 1948 amendment, the provision that the authorities shall reconsider their action annually as of the birthday of each member does not preclude the Personnel Committee from sooner terminating the employee's service if changes in the physical or mental health of the employee or other proper circumstance so warrant.

This memorandum should not be construed as expressing any opinion as to whether, after due consideration, Mrs. Smith should or should not be retained in state service for an extra year. That determination is for your Committee alone, recognizing that this employee by her special unique situation, as above set forth, has already received unusual consideration by your study of her status on the merits without prejudice by the procedural defects.

Very truly yours,

George F. Nelson
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